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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 935

HENRY J. CARUSO,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

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Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

Petitioner, Henry J. Caruso, prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of California, Second Appellate District, entered in the above-entitled case on October 21, 1959.

Opinions Below.

The opinion of the District Court of Appeal is reported at 174 A. C. A. 677. It is set forth as Appendix A to this petition. The Superior Court, Los Angeles County, State of California, rendered no written opinion.

Jurisdiction.

The judgment of the District Court of Appeal was entered on October 21, 1959. A timely petition for rehearing was filed by petitioner on November 4, 1959. The petition for rehearing was denied by the District Court of Appeal on November 17, 1959. Petitioner filed a timely petition for hearing in the California Supreme Court on November 27, 1959, together with an Application to Produce additional evidence; that on December 17, 1959, the Supreme Court granted the application to produce additional evidence but denied the petition for hearing. That thereafter a petition was filed on January 29, 1960 in the Supreme Court of the State of California, requesting the Supreme Court to recall the remittitur handed down by the District Court of Appeal, until the Supreme Court designated the time and place, and before whom, under Rule 23(b) of California Rules on Appeal, the additional evidence was to be produced, pursuant to the prior granting of said request; that notwithstanding such previous granting of leave to produce additional evidence, the Supreme Court now refused to designate the time and place and before whom such evidence was to be produced and denied petitioner's request on March 9, 1960.

On March 14, 1960, Mr. Justice Douglas signed an order extending the time to file a petition for writ of certiorari in the Supreme Court of the United States, to and including March 14, 1960.

On March 21, 1960, Petitioner made application to the California District Court of Appeal for a writ of supersedeas, pending his filing of a petition for certiorari in the Supreme Court of the United States, which was denied. On March 21, 1960, petitioner began to serve his sentence.

The jurisdiction of this court is invoked under 28 United States Code, Section 1257(3).

Constitutional Provisions Involved.

The pertinent provisions of the Constitution of the United States and the Constitution of the State of California are as follows:

The Fourteenth Amendment, United States Constitution provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

Section 13, Article I, California Constitution provides:

> "In criminal proceedings, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend in person and with counsel."

Statement.

Petitioner, Henry J. Caruso, for many years directed a corporate Chrysler Automobile Dealership, with branches in various locations in Los Angeles County. He had built up a considerable business empire and this appeared to have generated some sense of envy among competing dealers.

Petitioner was indicted on the basis of complaints for certain purchases of automobiles made through salesmen

and other personnel of petitioner's corporate Automobile Agencies.

Although some of the complainants vaguely suggested that this petitioner was consulted on some of the sales, the fact is that petitioner's duties as head of these several widely scattered agencies, were so extensive as to keep him so fully occupied with management as to allow him on direct contact with any individual transaction.

By indictment numbered 190353, returned by the Grand Jury on April 25, 1957, petitioner, together with ten other defendants, was charged with one count of criminal conspiracy in violation of Section 182(4), California Penal Code, eight counts of Forgery in violation of Section 470, California Penal Code and ten counts of Grand Theft in violation of Section 487(1), California Penal Code.

By indictment numbered 191857, returned by the Grand Jury on June 5, 1957, petitioner, together with sixteen other defendants, was charged with fifteen counts of Grand Theft in violation of Section 487(1), California Penal Code, and ten counts of Forgery in violation of Section 470, California Penal Code.

On October 1, 1957, petitioner withdrew his pleas of "Not Guilty" previously made to Counts XII and XIII of indictment 190535 and to Counts VII and IX of indictment 191857, and entered pleas of "Guilty" to said counts;[1] eleven of the other defendants chose to go to trial.

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[1]Counts XII and XIII of indictment 190535 read in part as follows:

"Count XII: . . . Ladimir Macura and Henry J. Caruso are accused by the Grand Jury of the County of Los Angeles, State of California, by this indictment of the crime of Forgery, in viola-

Probation and sentence and disposition of the remaining counts against petitioner were continued to November 8, 1957.

Of the eleven defendants who chose to go to trial by submitting their cases to the court on the testimony of the Grand Jury, nine of them were found not guilty by the court and only two of the defendants were found guilty. Probation and sentence of the remaining defendants, including petitioner, were continued to January 22, 1958.

Right after Mr. Bonpane, who had withdrawn, reentered the case, on December 11, 1957, pursuant to Sec-

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tion of Section 470, Penal Code of California, a felony, committed prior to the finding of this indictment and as follows:

"That on or about the 14th day of April, 1956, at and in the County of Los Angeles, State of California, the said defendants Ladimir Macura and Henry J. Caruso, who, at the time and place last aforesaid, did willfully, fraudulently and feloniously make, force, alter and counterfeit a certain contract and purchase order agreement and order in writing for the payment of money in excess of Two Hundred Dollars ($200.00), and did then and there utter, publish and pass, the same, knowing that said contract and purchase order agreement was false, forged, altered and counterfeited as aforesaid, with intent then and there to cheat and defraud Jack E. Dover."

"Count XIII: . . . Ladimir Macura and Henry J. Caruso are accused by the Grand Jury of the County of Los Angeles, State of California, by this indictment, of the crime of Grand Theft in violation of Section 487, Subdivision 1, Penal Code of California, a felony, committed prior to the finding of this indictment, and as follows:

"That on or about the 14th day of April, 1956 at and in the County of Los Angeles, State of California, the said defendants, Ladimir Macura and Henry J. Caruso, who, at the time and place last aforesaid, did willfully, unlawfully and feloniously take money and property of a value in excess of Two Hundred Dollars ($200.00), lawful money of the United States, the personal property of Jack E. Dover.

Counts VII and IX of indictment 191857, read in part as follows:

". . . Henry J. Caruso and Sidney Schraier are accused by the Grand Jury of the County of Los Angeles, State of California,

tion 1018 of the Penal Code of the State of California, and long before the imposition of sentence, petitioner filed his written notice to move to withdraw his pleas of guilty to all of the four counts to which he had theretofore pleaded guilty. [Clk. Tr. pp. 280, 288]. The motion was based on the transcript of the proceedings on the entry of the pleas of guilty and on several affidavits filed by petitioner in support of said motion. The motion was argued, heard and denied on December 16, 1957, without opinion or the slightest expression by the court [Clk. Tr. pp. 302, 357].

On January 22, 1958, the day before sentence, petitioner again moved to withdraw his pleas of guilty. The motion was again denied, without opinion or any reason therefor [Clk. Tr. p. 432]. On January 23, 1958, petitioner was given a suspended sentence. Probation was granted for a period of ten years, conditional upon spend-

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by this indictment of the crime of Grand Theft in violation of Section 487, Subdivision 1, Penal Code of California, a felony, committed prior to the finding of this indictment, and as follows:

"That on or about the 10th day of July, 1955 at and in the County of Los Angeles, State of California, the said defendants, Sidney Schraier and Henry J. Caruso did willfully, unlawfully and feloniously take money and property of a value in excess of Two Hundred Dollars ($200.00), lawful money of the United States, the personal property of Clare Ferguson."

"Count IX: . . . Henry J. Caruso is accused by the Grand Jury of the County of Los Angeles, State of California, by this indictment, of the crime of Forgery in violation of Section 470, Penal Code of California, a felony, committed prior to the finding of this indictment, and as follows:

"That on or about the 8th day of January, 1956, at and in the County of Los Angeles, State of California, the said defendant, Henry J. Caruso, did willfully, unlawfully, fraudulently and feloniously make, forge, alter and counterfeit a certain contract and purchase order agreement and order in writing for the payment of money in excess of Two Hundred Dollars ($200.00), and did then and there utter, publish and pass the same knowing that said contract and purchase order agreement was false, forged, altered and counterfeited, as aforesaid, with intent then and there to cheat and defraud Lonnie Barrier."

ing the first year in the county jail, paying a fine of $10,000.00 and getting "out of the automobile business *or any business involving sales to the public.*"

A Motion by petitioner to dismiss the remaining counts was denied, the trial court stating that the remaining counts would be dismissed on motion of the people if a remittitur came down affirming the judgment [Clk. Tr. p. 516].

Summary of Material Affidavits in Support of Motions to Withdraw Pleas.

Petitioner, in support of both of his motions to withdraw his pleas of "Guilty," filed affidavits stating in essence as follows:

That his pleas of guilty were entered as a result of the overreaching of his free will and judgment, in the following respects:

That petitioner plead guilty, not because he believed himself guilty of any offense, but solely and only upon the advice of one of his recent counsel, Fred Howser, who admitted later in open court that he had no familiarity with the facts of the case and had not even read the outside cover of the Grand Jury Transcript when he induced petitioner to plead guilty.

Dire representations made by said attorney, giving emphasis to threats allegedly made by the prosecuting attorney that he would seek new and additional indictments against petitioner if petitioner did not plead guilty to the four counts and if he should go to trial and be acquitted of the pending charges, thus engendering in petitioner's mind the fear that the District Attorney by reason of animosity would subject him unjustly to protracted and costly litigation.

That petitioner was emphatically and convincingly told that he would have to enter his pleas of guilty on the very day on which the pleas were entered, and that he could not have any additional time to consider the matter, or to call or consult with his chief counsel Mr. Blase A. Bonpane, who had represented petitioner from the beginning and who was the only counsel thoroughly familiar with the evidence and who was then out of the city, attending the State Bar Convention at Monterey as a delegate of the Los Angeles Bar Association.

That petitioner was guaranteed by said attorney Howser, and Howser assured him, that he had arranged with the District Attorney's office that if petitioner plead guilty to the above four counts, he would be granted probation, that he would receive a misdemeanor sentence and a possible fine [Clk. Tr. p. 384].

That lending support to this representation by Attorney Howser, petitioner had been observing Attorney Howser during the discussions of this case frequently going in and out of sessions with the District Attorney's office, all of which lent credence to Howser's representations that he had made a "deal".

The District Attorney, in admitting his meetings with Howser, stated that Mr. Howser said to him that he would have a "hard time selling it" to his client; but that personally Howser thought this was a reasonable way to dispose of this long, complicated and annoying matter; that the District Attorney further stated that Howser then communicated with him and reported he had persuaded his client "to accept this." [Rep. Tr. p. 3119, lines 15-20].

That at the time of the hearing on the motion to withdraw the pleas of guilty, the District Attorney stated

that "if the victims were made out to be mistaken and there were misunderstandings as to the terms, then the District Attorney wouldn't have much of a case. That is where the People will suffer if this motion is granted" [Rep. Tr. p. 3126], and stated further than when a man makes a deal with the District Attorney's office "that is the deal that he stays by." [Rep. Tr. p. 3124, lines 1-2].

That petitioner was under a misapprehension that as a minority stock holder in certain corporations, petitioner could nevertheless be convicted of offenses that might possibly have been committed by some of the sales personnel, even though petitioner was totally ignorant of the transaction, and even though he had not authorized or acquiesced in or knowingly participated therein.

That petitioner was suffering from extreme mental anxiety and distress as the result of the indictments and prosecution and the crushing financial losses caused by the scurrilous, disparaging and inflamatory publicity appearing about him in the metropolitan newspapers, and over the radio and television broadcasts following the return of the indictments.

That petitioner had become physically and mentally ill by reason of the adverse publicity and the resulting rash of anonymous phone calls and letters received by him and members of his family, which contained veiled and actual threats of physical harm to petitioner and his family.

That not having had any prior experience in criminal proceedings, petitioner was uninformed of the procedure pertaining to the disposition of criminal cases and of the nature of proof that the law regarded as relevant and material. For this and the other reasons stated in the affidavits, petitioner found himself without courage to question or disagree with the efforts of Howser, a former

District Attorney, who continued to urge upon him to plead guilty upon deceptive and fraudulent statements; that petitioner was innocent but was doing what Attorney Howser told him to do because he was now so confused, bewildered and depressed that he could place no reliance on his own mind [Clk. Tr. p. 385].

That after having been persuaded to plead guilty by the inducements and representations of said Howser, petitioner learned for the first time that Howser had not even read the outside cover of the Grand Jury Transcript of the testimony; nor made any study of the mass of records in the case; that he had relied entirely upon the statements made to him about petitioner's case by those who would justify prosecution—the deputies in the District Attorney's office, in whom Howser chose to repose implicit faith and who allegedly told him that they had more than enough evidence to convict; that the case against petitioner was "shut and closed" and that if he went to trial the jury would "murder him." [Clk. Tr. p. 385].

Said attorney Howser, who had been associated as attorney of record only since the middle of August, 1957, while petitioner was indicted in April, 1957, stated in his affidavit that he had never read any part of the Grand Jury testimony prior to his inducing petitioner to enter pleas of guilty [Clk. Tr. p. 47]. and that in conference with the District Attorney and several deputies, he was told that the case against petitioner was "shut and closed" and that if he went to trial before a jury, the jury would "murder" him; that based upon Attorney Howser's knowledge of the District Attorney's office, he himself having been a former District Attorney of Los Angeles County, he *assumed* that the District Attorney had competent evidence supported by credible witnesses, which in the light

of the adverse and widely disseminated publicity, would assure a conviction; that Howser stated he had no reason to question the truth of the statements made by the representatives of the District Attorney's office and that predicated on such statements, he persuaded petitioner to enter his pleas of guilty [Clk. Tr. pp. 261-267].

That Attorney Howser stated to petitioner, after nine of the eleven defendants who went to trial, were acquitted, that he now knew he had been deceived and misled by his former deputies in the District Attorney's office; that he had made a grave mistake and should not have influenced petitioner to plead guilty.

In open court on oral argument of the motion made on January 22, 1958, Attorney Howser made the following statement to the court; in admitting that he alone "advised" petitioner to plead guilty:

> ". . . . I want to say that, in my honest opinion, Mr. Caruso's case is a distinction in that he relied upon an ex-District Attorney of Los Angeles County to advise him as to what he should do. And may I say, your Honor, *not having even seen the outside cover of the Grand Jury Transcript*, and as a past District Attorney of this community, with full faith and confidence in representations and statements to me of deputies in the office that I once held, of deputies I trusted, such as Clifford Crail, a man of 30 years experience in the office of District Attorney, I took his word for it that they had this man *dead bang and they would murder him* if he went to trial, and I told Mr. Caruso that and he believed me, and I don't think any court in this land would criticize Mr. Caruso for not believing.

"It was only later that I learned, when I had an opportunity to get into this case, when I had the opportunity to listen to these witnesses for five and a half weeks before your Honor, did I conclude—and I am not selling my soul, if you please; *I am trying to vindicate rightfully the sorriest mistake that I have ever made in the practice of law.* . . ." [Rep. Tr. pp. 3108-3109].

The Appellate Court in commenting upon the effect of this startling statement by Attorney Howser, said that after all the trial court did not have to believe this "self-stultifying statement," although there was no contradiction thereof nor did Howser stand to gain anything but condemnation for that open confession (App. p. 15).

The only comment in the record as to that occurrence is the District Attorney's bland statement that,

"It may be true that he hadn't read the Grand Jury Transcript. That is a thing I wouldn't charge him with, having urged his client to plead guilty without having the faintest conception of what he was charged with, but that is his statement that that is what he did." [Rep. Tr. p. 3122, lines 6-10].

Blase A. Bonpane, chief counself for Mr. Caruso since the very inception of the case, stated in his affidavit that the trial date for the cases was set for October 1, 1957, but because he was a delegate to the State Bar Convention held in Monterey, California, that year, he requested a continuance of the case which was granted and reset for trial on October 21, 1957; that he left for Monterey on September 28, 1957, and was not in Los Angeles on October 1, 1957 the day the pleas were made;

that although he was chief counsel for Mr. Caruso, and recognized as such by the District Attorney [Rep. Tr. p. 3114, line 10], he had not been contacted or consulted by Mr. Howser or the District Attorney; that he took no part in the conferences between Mr. Howser and the District Attorney and his deputies, leading up to said pleas of guilty; that he was never advised nor did he have any knowledge whatsoever of the action flagrantly taken in court by Howser on the date when Howser was only to effect the postponement theretofore agreed upon, until he read in the newspaper the next morning at Monterey that such pleas of guilty had been entered [Clk. Tr. pp. 268-274] and that after this unwarranted development Bonpane withdrew from the case and had no further participation therein, until December 10, 1957 [Clk. Tr. p. 286].

Clifford Crail, Assistant Chief Trial Deputy in the District Attorney's office, verified, in his affidavit, the conference held with Mr. Howser wherein the question of punishment of Mr. Caruso upon a plea of guilty was discussed and stated that he told Mr. Howser in substance and effect that a jury would convict Henry J. Caruso, but he did not believe he used the term "would murder him." [Clk. Tr. pp. 306-312].

Cecil W. Collins, of counsel, stated in his affidavit that he was present when Mr. Howser told petitioner of his private meetings with the District Attorney and his representatives and heard the representations made to Mr. Caruso; that in one of the conferences Mr. Collins attended, Mr. Crail of the District Attorney's office, in answer to a statement that petitioner could not get a fair trial because of the adverse publicity, stated: "You are right." [Clk. Tr. pp. 70-75].

At the proceedings conducted in open court, on October 1, 1957, before Judge Noble, at the time of the entry of the pleas of guilty, the following took place:

"Mr. Crail: (to petitioner) It is your desire to enter pleas of guilty to those four counts, is that correct?

Defendant H. J. Caruso: Yes, it is.

Mr. Crail: You are doing this because you are actually guilty of these offenses?

Defendant: Yes. It is under advice of counsel.

Mr. Crail: And for no other reason?

Defendant H. J. Caruso: That's correct.

Mr. Crail: And no one is forcing you to do this?

Defendant H. J. Caruso: No, sir.

Mr. Crail: You are doing it freely and voluntarily?

Defendant H. J. Caruso: I am doing it freely and voluntarily under the advice of counsel.

Mr. Crail: No one has told you what the sentence will be, is that correct?

Defendant H. J. Caruso: That's correct.

Mr. Crail: You understand that the Court fixes the punishment?

Defendant H. J. Caruso: I understand.

Mr. Crail: The offense of forgery, a felony, as set forth in Count XII of Indictment Number 190535, how do you now plead?

Defendant H. J. Caruso: I plead guilty on the advice of counsel.

Mr. Crail: To Count XIII in the same indictment, charging you with the offense of grand theft, how do you plead?

Defendant H. J. Caruso: I plead guilty under the advice of counsel.

Mr. Crail: To the offense of forgery as set forth in Count IX of Indictment Number 191,857, how do you plead?

Defendant H. J. Caruso: I plead guilty under the advice of counsel.

Mr. Crail: To Count VII in that same Indictment charging you with the offense of grand theft, how do you plead?

Defendant H. J. Caruso: I plead guilty under the advice of counsel." [Rep. Tr. pp. 6-7].

Petitioner contended in his motions to withdraw his pleas that he had pleaded guilty under fraud, duress, mistake, ignorance and by the overreaching of his free will and judgment. The Superior Court denied petitioner's motions and passed sentence upon petitioner.

On appeal, the District Court of Appeal, Second Appellate District, affirmed the order. The District Court of Appeal appears to have taken the view, and seems to have considered these motions as having been made after sentence, and that the motions were in the nature of *coram nobis*, whereas the facts are that the motions were made prior to sentence under authority of Section 1018, Penal Code of California. The court also rejected petitioner's contention that the so-called "advice of counsel" was fraudulent and spurious; and ruled that petitioner, having pleaded "on advice of counsel," was thereby bound by the acts of his attorney, refusing even to credit the statement of Attorney Howser in open court that he had been deceived into advising his client to plead guilty.

In his Petition for hearing in the Supreme Court of the State of California petitioner again urged the same points and the constitutional question that he had been deprived of his right of trial and due process of law under Section 13, Article I of the California Constitution and the Fourteenth Amendment of the United States Constitution (Pet. for Hear. pp. 64-65), and at the same time filed an application for the production of additional evidence before the Supreme Court under Rule 23(b) of the Rules on Appeal, said additional evidence being of a more convincing nature and in further support of the contention that petitioner was coerced illegally and fraudulently into pleading guilty; that the Supreme Court, while granting the application to produce additional evidence, nevertheless denied the petition for hearing and then inexplicably refused to set the time or place for taking the additional evidence or to name the judge or magistrate who was to hear such evidence, as required by the Rules on Appeal.

Reasons for Granting the Writ.

I. The California District Court of Appeal has decided an important constitutional question relating to the effect of petitioner's right of trial and due process of law in such a way as to nullify the force and effect of the Fourteenth Amendment to the United States Constitution and Section 13, Article I of the California Constitution, and deprived petitioner of his rights thereunder.

II. The California District Court of Appeal has decided an important constitutional question relating to the effect of deceptive and fraudulent advice of counsel in such a way as to nullify the right of petitioner to with-

draw his pleas of guilty when entered illegally, coercively and fraudulently thus depriving petitioner of his constitutional right of trial and due process of law in his case.

III. The California District Court of Appeal has decided an important constitutional question apparently based upon the wrong assumption that petitioner's motions to withdraw his pleas of guilty were made after sentence when, in fact, the motions were made under Section 1018, California Penal Code, long before sentence, and thus deprived petitioner of his constitutional right of trial and due process of law.

I.

The California District Court of Appeal Has Decided an Important Constitutional Question Relating to the Effect of Petitioner's Right of Trial and Due Process of Law in Such a Way as to Nullify the Force and Effect of the Fourteenth Amendment to the United States Constitution and Section 13, Article I of the California Constitution, and Deprived Petitioner of His Rights Thereunder.

In 1949, the California Legislature amended Section 1018, Penal Code of California, for the purpose of liberalizing that section to the end that if justice would be promoted thereby, a defendant should be permitted to withdraw his plea of guilty.

California Penal Code, Section 1018 provides in part:

> ". . . . On application of the defendant *at any time before judgment* the court may, and in case of a defendant who appeared without counsel at the time of the plea the court must, for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted:

". . . This section shall be *liberally construed* to effect these objects and to promote justice."

The question presented is whether a defendant who makes a motion to withdraw his pleas of guilty before judgment or sentence, on the ground that his pleas were entered under duress, fraud, mistake, ignorance, inadvertence, promises and other factors overreaching his free will and judgment, should not be allowed to withdraw said pleas of guilty and enter pleas of not guilty in order to promote justice, in view of the Legislative mandate that Section 1018, Penal Code, should be liberally construed.

It has been held time and time again in the courts of California, and in other jurisdictions, that the withdrawal of a plea of guilty should not be denied in any case where it is in the least evident that the ends of justice will be subserved by permitting a not guilty plea to be substituted, and that the *least* surprise or influence causing a defendant to plead guilty when he has any defense at all should be sufficient cause to permit a change of plea from guilty to not guilty. (*People v. McGarvy*, 61 Cal. App. 557, 563; *People v. Gilbert*, 25 Cal. 2d 422, 433; *People v. Miller*, 114 Cal. 10; *People v. Cox*, 156 Cal. App. 2d 472; *People v. Griffin*, 100 Cal. App. 2d 546; *People v. Burkett*, 118 Cal. App. 2d 204; *People v. McGrory*, 41 Cal. 458; *People v. Young*, 138 Cal. App. 2d 425).

The rationale of this rule was stated in *People v. McGarvy*, 61 Cal. App. 2d 422, in which the California Court of Appeals, disagreed sharply with the contention that in order to grant a defendant's motion to withdraw his plea, it would be necessary to show misrepresentation, coercion, wrongful persuasion and promise of some-

thing that was not carried out, or that some act by an official connected with the case amounted to fraud or infringement of the defendant's rights.

The Court stated in *People v. McGarvy, supra:*

"We do not so understand the law. While such matters must be addressed to the sound discretion of the trial court, with each case viewed in the light of its own particular circumstances when there is reason to believe that the plea has been entered through inadvertence, and without due deliberation, or ignorantly . . . . the Court should be indulgent in permitting the plea to be withdrawn. (People v. McGrory, 41 Cal. 458). It might well be added that a court, in furtherance of justice, and upon such terms as may be proper and just, should likewise relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect (Section 473, California Code of Civil Procedure). *For how can it be contended seriously that when an inalienable constitutional right of a citizen is at stake in a criminal proceeding a greater and more technical showing is necessary than is contemplated by our Civil law when relief is sought from the judgments or orders taken against him. Where a right is conferred by law everything necessary for its protection is also conferred.*" (Emphasis added).

"No possible harm could have resulted or can result to the State by allowing him to withdrawn his plea of guilty and substitute a plea of not guilty. If he is innocent of the charge, as he has maintained, he ought to have a fair opportunity for a defense; otherwise, he would, under the ruling complained of,

suffer a great wrong. If he is guilty, the law still be vindicated, and the State will have an opportunity to establish that guilt under a plea of not guilty."

An honest appraisal of the facts and circumstances surrounding the pleas of guilty in this case, in the face of the human elements that necessarily must influence the mind and conduct of a defendant, finding himself for the first time under the stress and strain of a devastating experience in criminal court, dictates that by the liberal approach that the code imposes, the only safe course is to permit petitioner to withdraw his pleas of guilty and allow him to have his day in court.

Out of consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. On timely application, the court will vacate the plea shown to have been unfairly obtained or given through ignorance, fear or inadvertence. The court in the exercise of its discretion will permit an accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just (*Kercheval v. United States*, 274 U. S. 220, 224).

Leave to withdraw a plea of guilty, prior to sentence, should be freely allowed (*Poole v. United States*, 250 F. 2d 396).

Accused should not be held to a plea of guilty if it would result in manifest injustice. The courts are slow in holding an accused to an election to withdraw his right to trial by jury and enter a plea of guilty, since the right to trial by jury is one of the most valuable and highly cherished rights granted by the Constitution (*Leonard v. United States*, 231 F. 2d 588).

Fact that accused is represented by counsel of his choice is insufficient, alone, to relieve court of duty imposed by Federal rule providing that court shall not accept a plea of guilty without first determining that the plea is made voluntarily with understanding of the nature of the charge (*United States v. Davis*, 212 F. 2d 264).

Where the press of supposedly impending dire results of his failure to plead guilty has the effect of depriving a defendant of his will power, or so placed him in fear that he acted from the fear imposed, and not freely and voluntarily, the plea should be permitted to be withdrawn. (*State v. Poglianich*, 43 Idaho 409.)

> "The law seeks no unfair advantage over a defendant, but is watchful to see that the proceedings under which his life or liberty is at stake shall be fairly and impartially conducted. It holds in contemplation *his natural distress, and is considerate in viewing the motives which may influence him to take one or another course*. Therefore it will permit a plea of guilty to be withdrawn if it fairly appears that defendant was in ignorance of his rights and of the consequences of his act, or was unduly and improperly influenced either by hope or fear in the making of it." (*People v. Miller*, 114 Cal. 10.)

The pleas of guilty were further entered by petitioner, without due deliberation and on a variety of misrepresentations and unqualified promises of counsel, Howser, apparently corroborated by State officers, that a deal had been made with the State, which was relied on in good faith by petitioner and operated to deprive him of the exercise of his free will and judgment and to vitiate the pleas made in reliance thereon.

It is submitted that under the tests given in *People v. Gilbert*, 25 Cal. 2d 422, 433, the denial of petitioner's motions deprived him of his constitutional right of trial and due process of law.

The case of *People v. Gilbert, supra*, refers to the withdrawal *after judgment* of entry of pleas of guilty and certainly should apply with greater force to motions to withdraw a guilty plea *prior to judgment*, as in the case at bar.

> "While it is true that mere advice or assurances by a private attorney will not vitiate a plea entered in reliance thereon (citations) we are of the view that a contrary rule should prevail if the statements of an attorney amount to an unqualified factual representation (which is untrue) that the state or a responsible officer thereof, such as a judge of competent authority or a district attorney, has entered into a bargain purporting to commit the state to give the defendant a reward, in the form of immunity or a lesser punishment that he might otherwise receive, in exchange for a plea of guilty, where such representation is *apparently* substantially corroborated by acts or statements of a responsible state officer, is in good faith relied upon by the defendant, and actually operates to preclude the exercise of free will and judgment on the part of the defendant.
>
> "The most critical point is substantial deprivation of the exercise of the free will and judgment of the party through an act participated in by the state . . . if the representation of the private attorney *presents a purported commitment by a responsible state officer which if actually made would vitiate the plea and if the acts or statements of such state*

officer, although innocently done or made, apparently corroborate the representation, are in good faith and without negligence relied upon by the defendant, and in truth operate to prevent the exercise of his free will and judgment, then the state in its solicitude for fairness will not accept the benefit of a plea so given." (*People v. Gilbert*, 25 Cal. 2d 422, 433.)

The test, then, is not what the judge or District Attorney did but what his attorney represented to the petitioner that they or either of them committed themselves to do, coupled with apparent corroboration, relied upon without negligence by petitioner.

The Appellate Court, in the case at bar, further observed that if Howser had in fact represented to petitioner that a deal had been made with the District Attorney's office, and with the judge, this representation did not entitle petitioner to change his plea, since, according to the Appellate Court, there was no evidence that a responsible official had given the "slightest semblance" of corroboration to this "false and unwarranted representation." (App. A, p. 16.)

There was indeed more than a "semblance" of corroboration to Howser's statement from the fact that there had been a number of fervid sessions with the District Attorney's office. Petitioner had observed Howser frequently going in and out of these sessions and certainly he, as anyone in similar circumstances, was bound to interpret what he saw as a manifestation of evidence corroborative of what Howser stated had actually transpired.

It is of interest to note that the trial deputy did in fact tell Mr. Howser that a jury would convict Mr. Caru-

so though he did not believe he used the terms "would murder him". [Clk. Tr. p. 312, lines 3-5]. When the trial judge asked this same deputy why he didn't move for dismissal when his case fell apart he stated: "You have to bear in mind that the Grand Jury returned this indictment. It is our duty to present the evidence. *Certainly it isn't our duty to pass on the guilt or innocence of a defendant or defendants.*" [Rep. Tr. p. 1060, lines 7-10].

Howser was obviously motivated into believing that he had made a "deal" with responsible public officials for a minor sentence, with probation and no jail. There is support for such belief. Immediately after sentence the trial judge stated, "I indicated to counsel *earlier in this case*, I volunteered the information that I always took into consideration if the defendant entered a plea of guilty in a case and didn't put the State to a long and expensive trial." [Rep. Tr. p. 3158, lines 11-14]. The District Attorney made constant reference to a "deal" made with appellant's counsel.

A most convincing point which should demonstrate that the guarantees were accepted by petitioner as actual guarantees and not in the nature of any assurances or mere advice of counsel is the fact that, as stated in the Probation Report [Clk. Tr. p. 442], "In 1956 he sold about 14,000 cars, at an estimated volume of $40,000,000." The trial court was, of course, apprised of the fact that the moment appellant plead guilty to four felonies his franchises to continue selling automobiles were revoked."

Surely, it is reasonable to concede that a man who in a period of eight years, starting with a $4,000 investment builds a business grossing $40,000,000 in a single year, must have sufficient reason and acumen not to

voluntarily destroy such an edifice, much less face a possible prison term, all the while professing his innocence, unless someone had overreached his judgment with guarantees that he faced no risk of going to jail.

Was there apparent corroboration and reliance in good faith? To a Court familiar with criminal proceedings, the act of the District Attorney in reducing 44 counts of an indictment to 4 counts is not in the least unusual. To a gullible defendant, one never having been involved in a criminal matter before [Clk. Tr. p. 435], this would mean that if 40 counts could be removed with such obvious facility, why couldn't it be true that what Howser guaranteed petitioner would actually take place.

Petitioner, by these proceedings, is not asking for a dismissal of the charges against him nor for a judgment of acquittal. He is merely seeking to be accorded his constitutional right of trial and the opportunity to be heard.

Petitioner has a good defense to the charges against him. The several affidavits filed by petitioner in support of his motions to withdraw his pleas of guilty, to which reference has been made throughout all of the proceedings, not only in the trial court but in the reviewing courts as well, contain ample evidence and proof of petitioner's innocence and the fact that he has a good and valid defense to all of the charges brought against him [Clk. Tr. pp. 353-356; 370; 246-254].

At the end of the sixth day of trial on the submitted cases of the co-defendants the court stated as follows:

> "The Court: Let me say to the District Attorney, so far in this case I am not much impressed by the evidence that has been offered here, and it is getting worse by the moment. If it continues, I am going to take some drastic action in this case. If you have

got any more counts that are as flimsy as the last one, it seems to me that we shouldn't waste the court's time in those matters. You know what kind of a case you have got. If you haven't got any better case than this, why don't you lay it on the table?" [Rep. Tr. p. 1055].

The very next day the following occurred in chambers:

"The Court: Let the record show that I have asked counsel to come into chambers to discuss this case. We have completed six trial days now and I am frank to confess to the District Attorney that I'm not very much impressed with what I have heard so far. You have two glaring examples of a waste of time, in my opinion, the witness yesterday that completely fell apart and the one the day before that could cut his tongue out for a $1,000; it would seem to me that the District Attorney ought to know more about his case than indicated here, and not waste the time of the court.

Feeling that way about it, I thought I ought to tell you. Furthermore, it would seem to me it is the duty of the District Attorney, when his case falls apart, to get on his feet and move for a dismissal, and not to sit there as though, 'Well judge, that is your problem.'

'I assume you have authority to—'

Mr. Crail: I have the authority if I think the situation merits it. . . . You have to bear in mind that the Grand Jury returned this Indictment. It is our duty to present the evidence. Certainly it isn't our duty to pass on the guilt or innocence of the defendant or defendants" [Rep. Tr. pp. 1059-1060].

"The Court: Now, as far as the Grand Jury is concerned, they only hear one side of it, and I can understand how they could get excited when this kind of evidence comes before them. But they ought to sit here and hear the other side of it" [Rep. Tr. pp. 1072-1073].

"The day before we have one character on the stand, and I think I used the expression this morning that he would cut his tongue out for $1,000. He told an investigator for the defense that he could forget a lot of things for $1,000, if he could get it.

To ask a court to believe a witness and convict anybody on testimony of that kind isn't going to be done in this Department, gentlemen" [Rep. Tr. p. 1086].

The denial of the motions for the withdrawal of the pleas of guilty, under the confusing and misleading circumstances surrounding the entry of said pleas, clearly constitute a deprivation of petitioner's right of trial, and due process of law guaranteed to him under the Fourteenth Amendment to the Constitution of the United States and Section 13, Article I of the California Constitution. This constitutional question of the right of trial and due process of law, is implicit in the entire proceedings in this case.

Petitioner's sole purpose in asking withdrawal of his pleas is that he might have his case adjudicated at a public trial according to law and evidence.

In sum, petitioner contends, that he was improperly, illegally, coercively and fraudulently induced to enter pleas of guilty to offenses as to which he had no knowledge of the law or evidence, and that he had no choice in the

selection, from the many others, of these particular offenses to which he was induced to plead guilty and that his application for withdrawal of pleas having been denied, he was deprived of his constitutional right of trial.

II.

The California District Court of Appeal Has Decided an Important Constitutional Question Relating to the Effect of Deceptive and Fraudulent Advice of Counsel in Such a Way as to Nullify the Right of Petitioner to Withdraw His Pleas of Guilty When Entered Illegally, Coercively and Fraudulently, Thus Depriving Petitioner of His Constitutional Right of Trial and Due Process of Law.

It is true that California courts have held that, without the deprivation of rights by extrinsic causes, a defendant who enters a plea of guilty solely on advice of counsel is not entitled to withdraw his plea. (*People v. Gottlieb*, 25 Cal. App. 2d 411; *People v. Snowden*, 149 Cal. App. 2d 552.)

But, the District Court of Appeal, in this case, proceeded to justify the affirmance of the trial court's denial of petitioner's motions to withdraw his pleas of guilty, merely upon the effect of the entry of the pleas of guilty on advice of counsel, and completely overlooked other factors bearing upon the deprivation of rights by extrinsic causes, which tended to vitiate the pleas.

What was the nature of the so-called "advice of counsel" to petitioner in this case by Attorney Howser? The advice was a fraud. Howser at the time of the entry of the pleas of guilty was representing to the court that petitioner was actually guilty of the offenses in question.

In this manner, Howser was making the positive assertion, *not warranted by the information in his possession,* that petitioner was actually guilty. *This was a fraud, even though Howser believed said assertion to be true.*

Section 1572 (2) of the Civil Code defines fraud. The California Code provides:

> "Actual fraud is committed by the positive assertion in a manner not warranted by the information of the person making it of that which is not true, even though he believes it to be true."

Whether Howser acted wittingly or unwittingly, was it, or was it not, a fraud for him, at the time of the entry of the pleas, to have conveyed the impression to his client that he was well aware of and well informed on all the evidence and that based on this and other matters, and on the alleged "deal" which the District Attorney's office, in their affidavits unequivocally denied, the client should plead guilty.

It would appear that only by dealing with the facts in complete defiance of the spirit and letter of the law, could it be stated, under all the surrounding circumstances, not losing sight of petitioner's state of mind and the devastating effect of this cyclonic turn of events in his life, that petitioner's pleas of guilty were entered with a free and open mind, without an overreaching of his mental faculties, with full knowledge of all the facts and with the honest advice of informed counsel.

A plea of guilty should be permitted to be withdrawn, if it appeared that such plea was entered unadvisedly, or through misapprehension in consequence of the *misrepresentation* of his counsel, where the client testified in his affidavit that his attorney had assured him that he had arranged with the state's attorney that the bigamy

charge was to be dropped, and it was not unreasonable that the client would follow the advice of his counsel and enter a plea of guilty, expecting and believing that in some way he would not be imprisoned on said charge. *People v. Walker*, 250 Ill. 427.

The expression "advice of counsel" is not intended to be a mere form, or a snare to mislead a defendant already confused and confounded by the deeply disturbing, if not frightening effect, of indictments and legal prosecution. It is not intended to be an illusory, specious or spurious compliance with a rule of law. It is not a mere high-sounding phrase or *some sort of legal embellishment, nor a judicial artificiality or the tinkling of legal cymbals.*

Here was an attorney who admitted in open court that he did not even take the trouble to read the outside cover of the Grand Jury testimony but induced his client to plead guilty to four serious offenses because deputies in the District Attorney's office told him they had a "shut and closed" case against petitioner.

It would be a sad state of affairs if the so-called advice of counsel should in all intances be granted legal acceptance, regardless of misrepresentation, coercion or fraud of counsel. Counsel stands in a fiduciary relation to his client and is under a duty to act in good faith and with knowledge of the facts.

Mr. Howser himself realized the spuriousness of his advice by his statements in his affidavit and his confession in open court that he had committed *"the sorriest mistake he had ever made in the practice of law,"* when he urged his client to plead guilty without having the faintest conception of what he was charged with. [Rep. Tr. pp. 3108-3109].

Legal advice is intended to mean *honest advice* given to a client by a lawyer, reasonably informed of his client's case, who has evaluated the evidence, and has acted in good faith and according to the legal tenets and the high tradition of the profession. Any other view would make a mockery of legal advice, and the legal profession as well.

Where it appears that a plea of guilty was entered through misapprehension of the facts or law, or in consequence of misrepresentation by his counsel . . . the court should permit the withdrawal of the plea of guilty and the substitution of a plea of not guilty). (*People v. Kloist*, 311 Ill. 179; *People v. Bonheim*, 307 Ill. 346; *East v. State* (Ind. App.), 168 N. E. 28).

The Honorable Court's attention is directed to the fact that in every instance, petitioner, in pleading guilty repeatedly qualified his answers by stating that he was pleading guilty "on advice of counsel."

The only inescapable implication that suggests itself from this repeated statement "on advice of counsel" is that there was a definite reservation in the mind of the defendant as to his guilt and that in pleading guilty "by advice of counsel" he was being dominated, governed, and overwhelmed in his thinking by the uninformed, mistaken, erroneous, fraudulent and spurious advice of his counsel Howser, who further dismayed petitioner by advising him that if he were acquitted at a trial, the District Attorney had threatened to secure new indictments against petitioner. [Clk. Tr. p. 385].

The very declaration of a plea of guilty by an accused, in open court, even without the repeated qualification that this was being done solely on advice of counsel, should at once call for some scrutiny by the court into

the circumstances of the plea, so as to make certain that the proceeding is not tinged with misunderstanding, misinformation, fraud, deception or coercion. Yet the trial judge, in the instant case, did not, in a single instance, trouble himself to inquire in the least why petitioner persisted in stating that he was pleading guilty only on advice of counsel.

It is respectfully submitted that this Honorable Court should examine the question of what constitutes true "advice of counsel" and lay down a fair standard of some of the indispensable elements in law as to which there appears to be no clear adjudication, especially as to the effect of fraudulent advice as bearing upon the entry of pleas of guilty.

III.

The California District Court of Appeal Has Decided an Important Constitutional Question Apparently Based Upon the Wrong Assumption That Petitioner's Motions to Withdraw His Pleas of Guilty Were Made After Sentence, When in Fact the Motions Were Made Under Section 1018, California Penal Code, Long Before Sentence, and Thus Depriving Petitioner of His Constitutional Right of Trial and Due Process of Law.

Notwithstanding the utter lack of basis therefor, the Appellate Court, in the instant case, devotes a considerable portion of the opinion in support of its contention that a defendant who pleads guilty may not withdraw his plea when he is motivated by the fact that the sentence he received will be more onerous than anticipated; or that the defendant is disappointed in the sentence he received following the plea of guilty and that this presents no ground for the exercise of judicial discretion to permit the withdrawal of the plea. (Appendix p. 18).

The Appellate Court apparently labored under a serious misapprehension of the facts. Petitioner had not yet been sentenced. Nor had there been a sentencing of any other defendants, which might have tended to generate some degree of fear or apprehension as to the severity of the sentence later to be imposed on petitioner.

Petitioner was not sentenced until January 23, 1958, over a month after he had made his motion to withdraw his pleas of guilty. During the period between the pleas and the motion to withdraw the pleas, there had been no occurrences of any nature, either in the disposition of the other cases or in the attitude or remarks of the court, which in any way tended to create any apprehension in petitioner's mind that his sentence would be more onerous than he might have anticipated when he plead guilty, as suggested in the various cases cited by the Appellate Court in support of this proposition.

In fact, the case of *People v. Francis*, 42 Cal. 2d 335, cited by the Appellate Court, is clearly distinguishable from the case at bar in that in the *Francis* case the probation officer had already made a report recommending denial of probation before the defendant requested to withdraw his plea of guilty. In the case at bar, there had been no probation report before the motion to withdraw the pleas was made nor had any other event occurred to cast a shadow over Caruso's situation.

The case at bar is not one in which the defendant seeks to withdraw his pleas of guilty as of right, as the appellate court appears to suggest under the authority of *People v. Francis, supra*, nor one without any supporting affidavits or without a showing that his pleas were entered under duress, fraud, mistake, ignorance, inadvertence, promises and other factors overreaching his free will and judgment.

It is interesting to note that long before the 1949 amendment to Section 1018, Penal Code, it has been the law in this state even as far back as *People v. McCrory*, 41 Cal. 458, that

> "when there is reason to believe that the plea has been entered through inadvertence, and without due deliberation, or ignorantly . . . the court should be indulgent in permitting the plea to be withdrawn."

As was also stated in *People v. McGarry*, 61 Cal. App. 2d 557,

> "The withdrawal of a plea should not be denied in any case where it is in the least evident that the ends of justice would be subserved by permitting the defendant to plead not guilty instead; and it has been held that the least surprise or influence causing a defendant to plead guilty when he has any defense at all should be sufficient cause to permit a change of plea from guilty to not guilty."

It must therefore be assumed that the Legislature not only intended to codify this prevailing philosophy in the final paragraph of Section 1018, Penal Code, but intended to go further by stating that in any case where justice would be promoted a defendant should be permitted at any time before judgment to withdraw a guilty plea.

Examples of this liberality are found in the cases of *People v. Cox*, 156 Cal. App. 2d 472, and *People v. Young*, 138 Cal. App. 2d 425.

In the case of *People v. Cox, supra*, the defendant having been properly catechized by the court on his request to withdraw his plea of not guilty and enter a plea of guilty, later stated to the Probation Officer that he

was not guilty and he entered a plea of guilty because his attorney made him do it. At the time of sentencing, the trial judge, while remarking that he did not believe that the defendant's counsel had instructed him to plead guilty, nevertheless said:

> "Well, the Court is sending this back on the Court's own motion because he stands here and pleads guilty and he tells us he pleaded guilty because he was in fact guilty and knew he was and nobody made any promises or anything; then turns around and tells the Probation Officer no, that his attorney told him to, otherwise, he wouldn't and he wasn't . . . I am not going to sentence a man with this kind of stuff who says he is not guilty after he pleaded guilty."

In *People v. Young, supra*, the defendant pleaded guilty because his attorney told him that he was unprepared, not having been paid his fee, and if Young went to trial the attorney would have to try the case "from the seat of his pants." On appeal the defendant contended that the trial court had abused its discretion in denying his motion to withdraw his plea and the appellate court stated:

> "Without going into further detail, it is sufficient to note that the record clearly presents a situation which, under the well established law on the subject, entitled appellant to the relief sought."

If the defendant Cox, in *People v. Cox, supra*, was entitled to have his plea of guilty withdrawn because he indicated to the Probation Officer he pleaded guilty only for the reason that his attorney told him to, otherwise "he wouldn't and he wasn't (guilty)," why must Caruso be denied the same right that was accorded to Cox

when the circumstances vitiating the pleas in Caruso's case are infinitely more flagrant. Not only did Caruso make a similar statement asserting his innocence to the Probation Officer but he indicated his belief of innocence at the moment he entered his pleas by pleading guilty only on advice of counsel—advice of counsel which, as elsewhere discussed in this Petition was spurious, baseless, erroneous and involved the assertion of facts, as being true, although not warranted by the information of the counsel making them.

Can it be said in good conscience that the ends of justice have been promoted when in two recent cases the courts have reacted promptly to the mandate of Section 1018, Penal Code, and other relevant authorities but in the instant case, the Appellate Court labored unduly, and appeared to go clear out of its way, it is respectfully submitted, to deny appellant the same rights and privileges, by affirming the judgment of the lower court which deprived appellant of his liberty, imposed a heavy fine and restricted him in the manner of earning his living for a period of ten years by prohibiting him from engaging in any business involving sales to the public.

If the pertinent statements of the court in *People v. Cox, supra,* and *People v. Young, supra,* are to be given due recognition and if the plain language of Section 1018, Penal Code, is to be followed, then justice will not be promoted by sentencing a defendant, as in the case at bar, who states in his own affidavit that he entered his plea, not because he believed himself to be guilty but because his judgment was overreached by extrinsic factors [Clk. Tr. p. 384], especially when such statements are corroborated by other affidavits submitted in appellant's behalf, including Attorney Howser's affidavit and How-

ser's revealing statement in open court that he had not even "seen the outside cover of the Grand Jury Transcript, as well as by the Probation Officer's report that defendant (Caruso) believes himself to be not guilty" [Clk. Tr. pp. 446-447].

> "No possible harm could have resulted or can result to the State by allowing him to withdraw his plea of guilty and substitute a plea of not guilty. If he is innocent of the charge, as he has maintained, he ought to have a fair opportunity for a defense; otherwise he would, under the ruling complained of, suffer a great wrong. If he is guilty, the law may still be vindicated, and the State will have an opportunity to establish that guilt under a plea of not guilty." (*People v. McGarvy*, 61 Cal. App. 2d 557, 564.)

The Appellate Court seems to have dealt with a writ of error *coram nobis*, which has no application whatever to the situation in this case, since petitioner's motions for change of pleas were made before sentence under Section 1018, California Penal Code, which is also a mandate that this section shall be liberally construed to effect "these objects" and to "promote justice."

The Appellate Court, in its opinion, held that petitioner had "wholly failed to explain the entry of the plea and the belated motion to withdraw it." The Appellate Court further stated in its opinion that if petitioner's plea was not the product of his free will, it was inconceivable that experienced counsel would wait over two months to advise petitioner to withdraw his pleas.

It is respectfully pointed out that the Appellate Court failed to take note of, and to consider, all the facts and

surrounding circumstances that are explanatory of the so-called delay in filing the motion for change of pleas.

First of all, the motion to withdraw the pleas was made long before sentence, the motion having been made and argued on December 16, 1957, and the defendant petitioner having been sentenced on January 23, 1958. The law nowhere prescribes when such a motion should be made so long as it is made *"at any time before judgment."* (Penal Code, Sec. 1018.)

When Attorney Bonpane first learned of the pleas of guilty, from reading about it in the newspapers, while he was at the Bar Convention, in Monterey, he became deeply disconcerted by the fact that petitioner had been euchered into entering pleas of guilty by a counsel, who just recently entered the case and who was the least informed, without this counsel observing the ethics, or indeed the common courtesy, of first advising or consulting with Attorney Bonpane before taking this radical step. Consequently, as set forth in his affidavit of December 14, 1957, Bonpane withdrew from the case on October 2, 1957, as counsel for petitioner, and took no further participation therein until December 10, 1957 when he was persuaded to re-enter the case [Clk. Tr. pp. 285-286].

The above circumstance, as is obvious, would be at least one explanation for the delay in making the motion to withdraw the pleas. It was only after Bonpane's re-entry into the case that the notice of motion for the withdrawal of the pleas was made and was argued by him on December 16, 1957.

It would have been quite extraordinary indeed to expect that any change of position would have come about sooner, when it is taken into account that Howser had not become

familiar with any of the facts and the evidence from the prosecutor's side until over six weeks later.

Furthermore, there were other reasons for the delay as shown by petitioner's affidavit, dated December 5, 1957 as follows:

> "That since the entry of my pleas of guilty to two counts in each indictment, I have acquired certain evidence material to the defense of said charge, and conclusively establishing my innocence, which evidence was unavailable to me, and could not, with reasonable diligence have been discovered prior to the date of the entry of said pleas, for the following reasons, to wit:
>
> 1. Witnesses refused or were reluctant to discuss the case with investigators for the defense.
>
> 2. The vast volume of contracts and other records to be searched through, covering a seven year period, were located or stored in various places in Los Angeles County, or out of the State of California.
>
> 3. When the submitted cases were tried, many alleged victims testified to an entirely different set of circumstances than they had testified to before the Grand Jury,—many times admitting their error under oath at the trial. That inasmuch as only a very few transactions were shown to me personally, having been handled by sales personnel, it was impossible for me or my counsel to have anticipated that the testimony of the witnesses was going to be changed."

A realistic appreciation of this situation, with all the distractions, and excitement generated by newspaper pub-

licity, radio and television commentators, would reveal that any decision by the parties in connection with the mass of evidence in the multitude of cases necessitated more time, thought and study as well as added conferences and discussions, in order to arrive at a reasonably correct and sensible course of action.

Moreover, even if petitioner had emerged from his mental fog shortly after the shocking impact of having pleaded guilty, he could hardly be expected in push-button fashion to evaluate the import of the evidence against the effect of his plea. He could hardly be expected suddenly to throw all caution to the winds and on his own responsibility take steps nullifying the action of his counsel (Howser) who had assumed to direct and dominate petitioner's case while pretending that he had knowledge of the facts although entirely uninformed.

It is significant to note that when the application for withdrawal of pleas of guilty under Section 1018, Penal Code was made and argued, it was not made and argued by Howser but was made and argued by Bonpane who now had been called back into the case, after having withdrawn as counsel about the first of October, right after the entry of the pleas of guilty.

Conclusion.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

BLASE A. BONPANE,
ROBERT MASLOW and
ROBERT E. FORD,
Attorneys for Petitioner.

APPENDIX.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Two.

The People of the State of California, Plaintiff and Respondent, vs. Henry J. Caruso, Kenneth G. Barnett, George Sheehan, James Cauthen, C. R. Buckner, Ladimir Macura, Sidney S. Schraier, Harold Andrews, Joseph E. Guccione, James L. Broadway and Robert Roberts, Defendants. Sidney S. Schraier, C. R. Buckner, Henry J. Caruso, Ladimir Macura, James Cauthen and Harold Andrews, Defendants and Appellants. Crim. No. 6253.

The People of the State of California, Plaintiff and Respondent, vs. Henry J. Caruso *et al.*, Defendants. Sidney Schraier, Carol R. Buckner, Henry J. Caruso and Robert Stratford, Defendants and Appellants. Crim. No. 6254.

Filed October 21, 1959.

Appeals from judgments of the Superior Court of Los Angeles County and from orders and sentence. H. Burton Noble, Judge. Judgments of Conviction affirmed; orders granting probation affirmed appeal from sentence and appeals from orders denying motions to withdraw pleas of guilty and to substitute pleas of not guilty dismissed.

For Appellant Sidney S. Schraier: Roger J. Pryor, Pauline Day Bakst.

For Appellant Henry J. Caruso: Robert E. Ford, Blase A. Bonpane, Robert Maslow.

For Appellant Ladimir Macura: Jack B. Tenney.

For Appellant James Cauthen: Gordon B. Friesen.

For Appellant Harold Andrews: Taylor, Sherman and Heller.

For Appellant Robert Stratford: Cannon & Callister, David H. Cannon, Reed E. Callister.

For Respondent: Stanley Mosk, Attorney General; Elizabeth Miller, Deputy Attorney General.

These are appeals from judgments of conviction on pleas of guilty entered by the appellants on October 1, 1957. At various times thereafter the appellants Henry J. Caruso, Sidney Schraier, Harold Andrews, Robert Stratford, Ladimir Macura and James Cauthen, moved to withdraw their pleas of guilty and substitute therefor pleas of not guilty. Appellants here contend that the trial court abused its discretion in denying their respective motions.

The appellants also purport to appeal from the orders denying the motions to change the plea, from the orders granting probation, and in one instance, [Andrews] from the sentence. An order denying a motion to withdraw a plea of guilty and substitute a plea of not guilty is not appealable (People v. Francis, 42 Cal. 2d 335, 336; People v. Singh, 156 Cal. App. 2d 363, 365) and no appeal lies from the sentence. (People v. Gallardo, 41 Cal. 2d 57, 60; People v. Yates, 165 Cal. App. 2d 489.) By the express terms of Penal Code section 1237 an order granting probation is deemed to be a final judgment for purposes of appeal. However, only appellant Stratford raises any objection to the terms of probation. Hence, with this one noted exception, we need not here discuss the propriety of the orders granting probation. On these appeals from the judgments of conviction we may review the orders denying the motions to withdraw the pleas of guilty (People v. Alexander, 130 Cal. App. 2d 529, 532;

People v. Murphy, 62 Cal. App. 709, 710, see 4 Cal. Jur. 2d 402, §543.)

Until 1957 appellant Henry J. Caruso was a successful automobile dealer in Southern California. He was the prime mover in establishing several retail automobile sales organizations which used his name extensively in their advertising programs. The other appellants were employees in the Caruso sales organizations. On April 25, 1957, in an indictment comprising nineteen counts returned by the Grand Jury of Los Angeles County, appellants Henry J. Caruso, Cauthen, Macura, Schraier, Andrews, and six other defendants were charged with one count of criminal conspiracy to cheat and defraud (Pen. Code, §182 (4)). Caruso was also charged with various of the other defendants with eight counts of forgery (Pen. Code, §470) and ten counts of grand theft (Pen. Code, §487 (1)). All defendants under this indictment were arraigned on May 6, 1957, and on June 10, 1957, each defendant moved to have the indictment set aside pursuant to Penal Code section 995. The motions were granted as to certain defendants and particular counts, and the indictment was dismissed as to one defendant. Appellant Caruso's motion was denied as to all nineteen counts, and on June 21, 1957, each defendant pleaded not guilty to each count in which he was charged and trial was set for October 1, 1957.

Meanwhile, on June 5, 1957, the grand jury again indicted appellants Henry J. Caruso, Stratford, and sixteen other defendants on fifteen counts of grand theft. On June 19, 1957, the defendants under this second indictment were arraigned. On July 10, 1957, each of the defendants moved to set aside the indictment, and hearing on the motions was continued to October 1, 1957.

The record reveals that on August 30, 1957, appellant Caruso was represented by attorneys Blase Bonpane and Cecil Collins. Andrews was represented by attorney Ward Sullivan. Cauthen was represented by attorney Gordon B. Friesen. Macura and Schraier were represented by attorney Jack B. Tenney. [Stratford's affidavit does not indicate by whom he was represented on that date, but he had not yet been required to plead to the June 5, 1957, indictment.] On August 30, 1957, on appellant Caruso's motion, attorney Fred N. Howser was associated as Caruso's counsel, and on defendants' motion the trial was continued to October 21, 1957.

On October 1, 1957, the date previously set for hearing on the motions to dismiss the June 5 indictment, Caruso appeared in the trial court with attorney Collins. The other appellants were present and on motion of all the defendants the hearing of the motions to dismiss the indictment was advanced to October 1st. The motions to dismiss under Penal Code section 995 were withdrawn and the six appellants herein pleaded guilty to certain of the counts with which they were charged.

Caruso withdrew his prior plea of not guilty and pleaded guilty to two counts (forgery and grand theft) of the April 25 indictment and two counts (grand theft and forgery) of the June 5 indictment. Stratford pleaded guilty to one count of the June 5 indictment (grand theft). Each of the other appellants pleaded guilty to one of the counts with which he was charged: Cauthen (grand theft), Schraier (grand theft), Marcura (forgery), and Andrews (grand theft).

A number of the indicted defendants (other than appellants) elected to stand trial on their pleas of not guilty, stipulating that their causes might be submitted on the

transcript of the grand jury proceedings, but reversing the right to offer additional evidence. The trial of these defendants was continued to October 21, 1957. On that date trial was commenced and proceeded intermittently from October 21st to November 18th.

On November 15, 1957, appellant Schraier moved to withdraw his plea of not guilty and on November 18th, his motion was denied. The trial of the defendants who had pleaded not guilty was proceeding apace, and on November 20, 1957, certain of the defendants under the two indictments were found not guilty on certain of the counts with which they were charged. During the course of the trial of the defendants who had pleaded not guilty, the trial judge commented regarding the apparent unreliability of certain witnesses for the prosecution and the consequent weakness of the case as against certain of the defendants. These comments need not be here repeated, nor need they be further discussed other than to point out that they had absolutely nothing to do with the charges to which appellants had pleaded guilty and had no reference to any of the complaining witnesses involved therein. They related only to the cases which were then on trial before the judge.

On December 6, 1957, Caruso filed a notice of motion for change of plea which was denied on December 16, 1957. On January 8, 1958, Caruso filed a second notice of motion for change of plea. On January 16, 1958, Schraier's second motion to withdraw his plea was denied. On January 17, 1958, Stratford filed notice of motion to withdraw his plea of guilty. On January 22, 1958, the other appellants, Cauthen, Andrews and Macura also moved to withdraw their pleas of guilty. Finally, on January 23, 1958 all the then pending motions to with-

draw the pleas were denied, and judgments of conviction were entered as to the six appellants on the charges to which they had pleaded guilty on October 1, 1957.

Caruso was given a suspended sentence. Probation was granted for a period of ten years conditioned on his spending the first year in the county jail, paying a fine of $10,000.00 and remaining "out of the automobile business or any business involving sales to the public." The other appellants were also granted probation on similar conditions. Stratford was granted probation for five years conditioned on his spending the first six months in the county jail, paying a fine of $1,000.00, and that he "get out and stay out of the automobile business."

"The plea of guilty constitutes an admission of every element entering into the offense charged, and constitutes a conclusive admission of defendant's guilt." (People v. Outcault, 90 Cal. App. 2d 25, 29; People v. Burkett, 118 Cal. App. 2d 204, 207.) A plea of guilty is an act charged with the most serious legal consequences; it is tantamount to a judgment of conviction. (People v. Jones, 52 Cal. 2d ....., ...[1]; People v. Hickman, 204 Cal. 470, 476; see 14 Cal. Jur. 2d 493, §247.) However, the law seeks no unfair advantage over the defendant (People v. Schwarz, 201 Cal. 309, 315; People v. Miller, 114 Cal. 10, 16) and although the code specifies that the withdrawal of a plea of guilty may be permitted before judgment (Pen. Code §1018) the court has the power to permit such withdrawal and the substitution of a not guilty plea after judgment has been pronounced. (People v. Campos, 3 Cal. 2d. 15; see 14 Cal. Jur. 2d 508, §259.)

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[1]Advance Report Citation: 52 A. C. 655, 670.

Although in a few states statutes confer an absolute right on the defendant to withdraw a plea of guilty at any time before judgment (see 22 C. J. S. 645, §421 (3); 16 C. J. 397, §730) in California, as in most states, the applicable statute (Penal Code §1018) provides that in the case of a defendant represented by counsel the court may for good cause shown, permit the plea of guilty to be withdrawn. The statute further provides that it is to be liberally construed to promote justice.[2] (People v. Singh, 156 Cal. App. 2d 363, 366; see People v. Francis, 42 Cal. 2d 335, 338.) Such a motion is addressed to the sound discretion of the trial judge.

As stated in People v. Ottenstror, 127 Cal. App. 2d 104, 109: "It is well settled in our law that an accused who seeks to set aside a plea of guilty must show good cause therefor, and the granting or denial of such an application rests in the sound discretion of the trial judge, and his decision will not be disturbed on appeal unless an abuse of that discretion is clearly shown (People v.

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[2]Penal Code §1018: "Unless otherwise provided by law every plea must be put in by the defendant himself in open court. No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall any plea of guilty of any other felony be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him of his right to counsel and unless the court shall find that the defendant understands his right to counsel and freely waives it and then, only if the defendant has expressly stated in open court, to the court, that he does not wish to be represented by counsel. On application of the defendant at any time before judgment the court may, and in case of a defendant who appeared without counsel at the time of the plea the court must, for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted.

"Upon indictment or information against a corporation a plea of guilty may be put in by counsel.

"This section shall be liberally construed to effect these objects and to promote justice."

Broady, 120 Cal. App. 2d 901, 903 [262 P. 2d 669], and cases therein cited). As was said in People v. Cooper, 123 Cal. App. 2d 353, 356 [266 P. 2d 566]: 'While a plea of guilty may be withdrawn pursuant to Penal Code section 1018 by reason of the mistake, ignorance, inadvertence or any factor that overcame the defendant's exercise of a free judgment, the basis of the motion for relief "must be established by clear and convincing evidence."'"

In People v. Griffin, 100 Cal. App. 2d 546, 548, it is stated that "[w]hile a plea of guilty may be withdrawn for mistake, ignorance, inadvertence or for any other factor overreaching a defendant's free and clear judgment, the fact of such mistake, fraud, duress or overreaching must be established by clear and convincing evidence, and an appellate court may conclude that the motion was properly denied where the defendant acted with knowledge of the facts and on advice of his counsel. (People v. Butler, 70 Cal. App. 2d 553, 561 [161 P. 2d 401]; In re Hough, 24 Cal. 2d 522, 531 ff. [150 P. 2d 448]; People v. Gottlieb, 25 Cal. App. 2d 411, 415 [77 P. 2d 489].)"

"A motion to withdraw a plea of guilty, pursuant to the provisions of section 1018 of the Penal Code, is addressed to the sound discretion of the trial court, and in considering such a motion the doctrines of 'presumptive innocence' and 'proof beyond a reasonable doubt' are inapplicable, since defendant has already admitted his guilt by his plea of guilty. This was the question before the trial court: Was the plea of guilty entered because of (a) duress, (b) fraud, (c) other forces overreaching the free will of defendant, or (d) was there a strong and convincing showing that defendant had been deprived of any legal right by an extrinsic cause?" (People v. Outcault,

90 Cal. App. 2d 25, 29-30; see, also, People v. Snowden, 149 Cal. App. 2d 552; People v. Alexander, 130 Cal. App. 2d 529.)

In the cases at bar, each appellant contends that the trial court abused its discretion in denying his motion to withdraw his plea of guilty and substitute therefor a plea of not guilty. Notwithstanding the common background of the proceedings in the court below, we shall discuss the contentions of each appellant separately since there are substantial differences in the facts which each appellant contends establishes an abuse of discretion in his case.

Caruso

Appellant Caruso's position is that "he entered his pleas of guilty as a result of factors overreaching his free will and judgment." From the affidavits submitted to the trial court and from certain additional material presented in his briefs, Caruso's position may be most favorably stated as follows:

Caruso, who had been represented by attorneys Blase A. Bonpane and Cecil Collins from the inception of the proceedings, retained attorney Fred N. Howser as additional counsel with a contingent fee arrangement for the payment of an additional sum of $50,000.00 provided that Caruso was granted probation and did not receive a jail sentence. Howser was associated as counsel of record on August 30, 1957. Thereafter, on September 25, 1957, Howser, without attorney Bonpane's knowledge, initiated a series of conferences with the district attorney's office with regard to Caruso's pleading guilty. These negotiations continued until October 1, 1957, when Caruso entered the pleas on which rests the judgment of conviction presently under review.

Attorney Bonpane, denominated "Chief Counsel" for Caruso, was a delegate to the State Bar Convention held in Monterey, California, and he left Los Angeles on September 28, 1957. Bonpane did not participate in the conferences which culminated in the guilty pleas, and he averred that he was not consulted by Howser, and had no knowledge of the proposal for his client to plead guilty until he read of the plea on October 2, 1957. It is Caruso's contention that Howser advised and induced him to plead guilty without any adequate knowledge of the facts of the case.

During the oral argument on the motion to withdraw the plea of guilty, Howser stated that he had advised his client to plead guilty without having read the Grand Jury transcripts and in reliance on representations of the deputy district attorney as to the strength of the People's case. Howser indicated that after he had examined the transcript of the Grand Jury proceedings and heard the People's case as to the other defendants, he concluded Caruso should withdraw his plea of guilty.

Caruso himself averred that his pleas of guilty were entered when he was in a state of mental distress, including fear, anxiety, and other emotional factors which prevented him from exercising calm, deliberate, and intelligent judgment. He contends that at all times he asserted his innocence, and that his plea was entered under the inducement of Howser.

Caruso does not contend that his plea of guilty was the result of duress or fraud. (See People v. Outcault, supra, 90 Cal. App. 2d 25, 30.) His contentions with respect to his mental state and his reliance on the importuning of an allegedly unprepared attorney involved factual questions for the trial court to resolve. (People v. Otten-

stror, 127 Cal. App. 2d 104, 109; People v. Griffin, 100 Cal. App. 2d 546, 548.) The trial court was not bound to accept and give credence to the affidavits submitted in support of the motion. (People v. Knight, 106 Cal. App. 2d 312, 315.) As stated in People v. Kirk, 98 Cal. App. 2d 687, at page 692: "A trial judge is not required to accept as true the sworn testimony of a witness, even in the absence of evidence contradicting it, and this rule applies to an affidavit. Further, the trial court as trier of the fact, is the judge of the credibility of the witness whether he testify in person or by affidavit. (Lohman v. Lohman, 29 Cal. 2d 144 [173 P. 2d 657]; Berg v. Journeymen's Plumbers & Gas Fitters Union, 5 Cal. App. 2d 582 [42 P. 2d 1091].)"

Appellant relies on People v. Campos, 3 Cal. 2d 15, as authority for the proposition that in the absence of affidavits to the contrary the trial court must accept the averments of defendant's affidavits, but that case is wholly inapplicable to the circumstances of the case at bar. In that case the defendant had pleaded guilty to first degree murder and was sentenced to hang. He thereafter moved to vacate the judgment and withdraw the plea. The defendant averred that his plea was entered on the representations of the district attorney to his counsel that he would not receive the death penalty. Notwithstanding the direct averments of the defendant as to statements by the district attorney, the People failed to file any affidavits in opposition to the motion, and on that basis the Supreme Court reversed an order denying the motion to vacate the judgment. That situation is quite different from the case at bar. Caruso does not contend that he was misled by statements of the district attorney. His affidavits deal with matters which were

peculiarly and only within his own knowledge and that of his counsel and could not be controverted by affidavits submitted by the People.

Caruso lays great emphasis on the mental and emotional strain that he was under at the time he pleaded guilty as one factor supporting his contention that the guilty plea was not a product of his free will and judgment. But this is not a case of a simple, unlettered defendant overwhelmed by the complex abstractions of the law who has but a few minutes to consult with his attorney before he was forced to plead. (See People v. Young, 138 Cal. App. 2d 425; People v. McGarvy, 61 Cal. App. 2d 557.) Caruso was a highly successful business man and corporate executive well skilled in the art of negotiation. Caruso had a college education and he had employed other skilled lawyers, Bonpane and Collins, to assist him. One of the two, attorney Collins, was present at one of the conferences anteceding the pleas and also appeared with Caruso on October 1 when he entered his pleas of guilty. At the time he pleaded guilty Caruso was advised specifically of the offense set forth in each count to which he pleaded guilty. To each count Caruso pleaded guilty with the statement that the plea was on or under "the advice of counsel". The circumstances revealed by the record are wholly inconsistent with the claim that the plea was not the product of Caruso's free will and judgment. The question whether Caruso's plea was a product of overreaching was a question for the trial court to resolve. (See People v. Griffin, supra, 100 Cal. App. 2d 546; People v. Burkett, supra, 118 Cal. App. 2d 204; People v. Van Valkenburg, 111 Cal. App. 2d 337; People v. Snowden, supra, 149 Cal. App. 2d 552.)

"Mere advice and persuasion or the expression of matters of opinion by his own attorney will not suffice to vitiate the plea. Neither will unwarranted or even wilfully false statements of factual matters by his attorney suffice. The private attorney is selected by the party and is his agent. But if the representation of the private attorney presents a purported commitment by a responsible state officer which if actually made would vitiate the plea and if the acts or statements of such state officer, although innocently done or made, apparently corroborate the representation, are in good faith and without negligence relied upon by the defendant, and in truth operate to prevent the exercise of his free will and judgment, then the state in its solicitude for fairness will not accept the benefit of a plea so given." (People v. Gilbert, 25 Cal. 2d 422, 443; see also: People v. Butler, 70 Cal. App. 2d 553, 562; People v. Martinez, 88 Cal. App. 2d 767, 772-773.)

Utterly without merit is Caruso's argument that his pleas of guilty "on the advice of counsel" should be regarded as "qualified" confessions of guilt. Although he answered in the affirmative when asked if he was entering his pleas of guilty because he was actually guilty of the offenses and if he was doing so freely and voluntarily, he now urges that the statement "I plead guilty on the advice of counsel" indicated that he was not actually acknowledging guilt but was reluctantly yielding to the influence of his own counsel.

There is nothing unusual about a defendant's pleading guilty on the advice of counsel and so advising the court. It strikes us as quite absurd to suggest that a plea of guilty entered *pursuant* to the advice of counsel should be regarded as less valid than one entered *without* legal

advice. The obvious truth is that the judge taking the plea was entitled to construe the reference to counsel's advice as an affirmation that Caruso's counsel had advised him as to the applicable law, the elements of the offenses with which he was charged and the nature and quantum of the evidence which the prosecution would be required to produce in order to prove his guilt to a judge or a jury. Any other construction would have involved the unwarranted assumption that lawyers Bonpane and Collins, not to mention Howser, had been derelict in the performance of their most obvious duties to their client.

This entire contention, moreover, is rested upon factual assumptions which the trial judge was more than justified in refusing to accept. Caruso's assertion that he relied entirely and exclusively upon Howser's advice could have been viewed with justifiable skepticism in view of the fact that attorney Collins was standing at Caruso's side when the pleas of guilty were taken. It appears from the record that Collins represented Caruso from the inception of the proceedings, appeared with and for him on numerous occasions, including appearances on motions to dismiss the indictments. The trial judge was entitled to believe that attorney Collins had become quite familiar with the nature of the charges and with the law and the facts relating thereto.

Any assertion by Caruso that he had not thoroughly canvassed all facets of his case with his several lawyers during the months which intervened between the return of the indictments and the entry of the pleas of guilty would have sufficed, we think, to arouse the skepticism of the most credulous judge.

Furthermore, the assertion that attorney Howser had not read the grand jury transcript and was wholly ig-

norant of the facts of the case is not supported in the record by any competent evidence. It could be regarded as significant that Howser's affidavit filed in support of the motion for change of plea contained no allegation to this effect. The only indication in the evidence that Howser had not familiarized himself with the facts is the averrment in Caruso's affidavit that: "after pleading guilty upon the advice of Mr. Howser, I learned for the first time that he had not read the transcripts nor studied the mass of records, but that he had relied upon the statements made to him about my case by his former deputies in the District Attorney's office, in whom he reposed great faith, who told him they had more than enough evidence to convict the seventeen defendants in the case." Such statement of what the affiant had "learned" is obviously hearsay (Estate of Dolbeer, 149 Cal. 227, 247), and entitled to little, if any, weight for any purpose. (See Franklin v. Nat. C. Goldstone Agency, 33 Cal. 2d 628, 631; Kellett v. Kellett, 2 Cal. 2d 45, 48; Pratt v. Robert S. Odell & Co., 63 Cal. App. 2d 78, 82; Enter v. Crutcher, 159 Cal. App. 2d Supp. 841, 845-846.) This is particularly true when the source of information is readily available, or if an affidavit of a person having personal knowledge can readily be obtained. (People v. Shuler, 28 Cal. 490, 495; Higgins v. City of San Diego, 126 Cal. 303, 314; Arnold v. Skaggs, 35 Cal. 684, 688; Slemons v. Paterson, 14 Cal. 2d 612, 616.)

Since Howser's affidavit was silent on this point, the trial judge was not required to give credence to his unsworn and self-stultifying statements, made in the course of argument, to the effect that counsel had advised his client in ignorance and in naive and childlike reliance upon the prosecutor's purported declaration of an opinion

that "they had this man dead bang and that they would murder him if he went to trial." (See Moore v. Thompson, 138 Cal. 23, 26.)

In one of his affidavits Caruso stated, "I was guaranteed by my attorney that if I plead guilty I would be granted probation, a misdemeanor sentence and a possible fine." The record indicates that the trial judge disbelieved this averment. Certainly the judge was not bound to believe that an attorney at law had guaranteed something that in the nature of things could not honestly and justifiably have been guaranteed. But even if the trial judge had believed that Howser had in fact represented to Caruso that a "deal" had been arranged with the District Attorney and the judge, Caruso would not have been entitled on the basis of such representation to change his plea. There was no evidence that any responsible official had given the slightest semblance of corroboration to this false and unwarranted representation. (People v. Gilbert, 25 Cal. 2d 422, 443; People v. Jones, supra, 52 Cal. 2d ....., ...)[3]

It would unduly and unnecessarily extend this opinion to discuss in detail Caruso's arguments in support of his contention that he has a good defense to each of the counts to which he pleaded guilty. Suffice it to say that these arguments are completely unconvincing. We are unimpressed with the minor discrepancies between the testimonies of the complaining witnesses and certain extrajudicial statements which they signed at the instance of persons who, at least inferably, were Caruso's agents. As a matter of fact most of these extrajudicial statements were contained in instruments releasing Caruso from civil

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[3]Advance Report Citation: 52 A. C. 655, 669.

liability in consideration of very substantial monetary payments. The record contains evidence which would support inferences that efforts were made on behalf of Caruso to reimburse certain of the prosecuting witnesses and to induce them to sign untrue exculpatory statements.

Efforts to reimburse a prosecuting witness (People v. Moore, 70 Cal. App. 2d 158, 163) or to manufacture evidence in his favor (People v. Burke, 18 Cal. App. 72, 91-92), indicate a consciousness of guilt on the part of a defendant, and evidence thereof is admissible against him as proof of his guilt. And while generally, evidence as to the conduct of third persons in attempting to reimburse a prosecuting witness or to manufacture evidence is inadmissible against a defendant where such conduct did not occur in his presence, if it is shown by the evidence, direct or circumstantial, that the defendant authorized the conduct of such third persons in attempting to manufacture evidence or suppress testimony, the evidence of such conduct is admissible against the defendant. (People v. Moore, 70 Cal. App. 2d 158, 163; People v. Burke, 18 Cal. App. 72, 92; People v. White, 47 Cal. App. 400, 401.)

In the exercise of its discretion the trial court may consider the defendant's delay in making an application to change a plea. In People v. Francis, 42 Cal. 2d 335, 337-338, the defendant was charged by information with two counts of knowingly issuing a check with insufficient funds. Defendant pleaded not guilty on April 25, 1952, and trial was set for June 19, 1952. On June 3 defendant substituted attorneys, and the new counsel obtained a continuance to July 30, when the defendant, with counsel present, pleaded guilty to one count of the information and applied for probation, hearing on which

was set for September 12. The probation officer's report, recommending denial of probation, was filed September 11. At defendant's request the date set for hearing was continued until October 10, 1952, when the defendant with his counsel moved to withdraw his plea of not guilty to one count. The motion was denied, and on appeal the Supreme Court affirmed the judgment of conviction. The court said: "The basis of the refusal was that defendant was delinquent in making his application to change his plea; that he had full opportunity to make it some time before it was made and he offered no justifiable excuse for the delay. . . . [W]e cannot say that the court abused its discretion in denying the motion."

If "considerable time" has elapsed between the guilty plea and the motion to withdraw the plea, the burden is on the defendant to explain and justify the delay. (People v. Francis, supra, 42 Cal. 2d 335, 338; see People v. Singh, 156 Cal. App. 2d 363 (one month); People v. Burkett, supra, 118 Cal. App. 2d 204 (3 weeks).) The motion to withdraw the plea may be motivated by the defendant's knowledge (cf. People v. Griggs, 17 Cal. 2d 621); or well founded belief (cf. People v. Van Valkenburg, 111 Cal. App. 2d 337, 342; People v. Francis, supra, 42 Cal. 2d 335; People v. Outcault, supra, 90 Cal. App. 2d 25, 29) that the sentence he will receive will be substantially more onerous than that he anticipated at the time he entered the plea of guilty. The fact that the defendant is disappointed in the sentence he received following a plea of guilty presents no ground for the exercise of the judicial discretion to permit the plea of guilty to be withdrawn. (Cf. People v. Dabner, 153 Cal. 398; People v. Manriquez, 188 Cal. 602; People v. Aseltine, 139 Cal. App. 768, 770-771.) A defendant charged

with an offense cannot be permitted to gamble on the anticipated result of a plea of guilty and when disappointed in the outcome re-establish a right to trial. (People v. Northcutt, 38 Cal. App. 2d 258, 259; People v. Bechtel, 124 Cal. App. 2d 659, 660.) Nor is the fact that after plea but before sentence the defendant has become apprehensive regarding the anticipated sentence sufficient to compel the exercise of judicial discretion so as to permit the plea of guilty to be withdrawn. (Cf. People v. Francis, *supra*, 42 Cal. 2d 335.) Nor may the defendant enter a plea of guilty confident that if by some fortuitous circumstance his chances of an acquittal are substantially improved, he may thereafter withdraw his guilty plea as of right. (Cf. People v. Gilbert, 25 Cal. 2d 422, 442.)

In the case at bar, Caruso has wholly failed to explain the entry of his plea and the belated motion to withdraw it. If the plea was truly the product of a complex of factors by which his free will and judgment was overreached, he had ample opportunity to promptly make those facts known to the trial court. Attorney Bonpane learned of the plea the day following, and although Bonpane averred he was "astounded," attorney Collins was present at one of the conferences at which the guilty plea was proposed, and as we have pointed out, he appeared with Caruso in open court when Caruso pleaded guilty to the four counts.

If Caruso's plea was not the product of his free will, it is inconceivable that experienced counsel would wait over two months to advise Caruso to withdraw his plea. Had the motion to withdraw the plea been successful, the prior plea of guilty would have been admissible against Caruso at a trial on the merits. (People v. Boyd, 67

Cal. App. 292, 302; cf. People v. Cooper, 81 Cal. App. 2d 110, 117; see Witkin, Evidence, 253 §225.) Experienced counsel would know that any delay in moving to withdraw the plea would bear adversely on the credibility of any explanation of the plea which the defendant might offer.

Instead, Caruso waited for more than two months before he moved to withdraw his plea. Meanwhile in the latter part of November certain of Caruso's co-defendants who had elected to plead not guilty had been acquitted on certain of the counts with which they were charged. In the circumstances the trial court could reasonably conclude that the concept of "overreaching" was an afterthought or recent contrivance evolved to meet Caruso's needs when he wished to have a trial on the merits —that Caruso decided that his plea of guilty was not the product of his free will and understanding only after intervening developments caused him to believe that he might successfully defend the action. (See People v. Van Valkenburg, *supra*, 111 Cal. App. 2d 337, 342.) The trial court did not abuse its discretion in denying Caruso's motion to change his plea; hence, the judgment as to him must be affirmed.

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The portion of the opinion of the Court of Appeals relating to other defendants has been omitted since they are not a part of these proceedings in the Supreme Court of the United States.

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Conclusion.

It is apparent, we think, that to a very large extent the same principles of law govern the cases of all six appellants. For that reason much that we have said in answer to the contentions of each appellant may be applied with equal force to the arguments advanced by each of the others. It would be wastefully repetitious to restate these obviously applicable and controlling principles in the disposition of each of the several cases. The conclusion is clear that none of the appellants has shown any abuse of discretion in any of the rulings presented for review.

Accordingly, each of the judgments of conviction is affirmed.

The several nugatory appeals from orders denying motions for leave to withdraw pleas of guilty and to substitute pleas of not guilty are dismissed.

The appeal of Andrews from the sentence is dismissed

The orders granting probation have been deemed final judgments for the purposes of this appeal, and each of said orders here presented for review is affirmed.

Herndon, *J.*

We concur.

Fox, *P. J.*

Ashburn, *J.*